

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

JANE DOES 1-6, et al.,

Plaintiffs,

v.

JANET T. MILLS, Governor of the State of
Maine, et al.,

Defendants.

Civil Action No. 1:21-cv-00242-JDL

**JOINT MOTION TO MODIFY PROTECTIVE ORDER, WITH INCORPORATED
MEMORANDUM OF LAW**

Defendants Janet T. Mills, Governor of the State of Maine, Jeanne M. Lambrew, Commissioner of the Maine Department of Health and Human Services (Department), Dr. Nirav D. Shah, Director of the Maine Center for Disease Control (Maine CDC) (collectively, “State Defendants”); and Defendants MaineHealth, Genesis Healthcare of Maine, LLC, Genesis Healthcare, LLC, Northern Light Health Foundation, and MaineGeneral Health (collectively, “Provider Defendants”) hereby jointly move to modify the Protective Order, ECF No. 36, in four ways.

First, Defendants request that the Protective Order be modified so that the requirement that Plaintiffs’ counsel “disclose in writing the names and business addresses of all Plaintiffs to this action, including which pseudonym applies to which Plaintiff (the ‘Identifying Information’),” ECF No. 36 at 1, is a continuing obligation to disclose any Identifying Information not previously disclosed. In particular, Defendants seek the disclosure of Identifying Information on Jack Does 1—1,000 and Joan Does 1—1,000.

Defendants need the information to fully understand the true scope of the litigation, to establish who is making the claims against them so that they can properly defend, and to know against whom the Court's final judgment will operate.

Second, Defendants request that the Protective Order be modified so that State Defendants may provide any and all Identifying Information to Provider Defendants' counsel of record.

Third, Defendants request that the Protective Order be modified so that State Defendants and Provider Defendants may use the Identifying Information for the balance of the litigation.

Fourth, Defendants request that the Protective Order be modified so that Provider Defendants' counsel of record may disclose the Identifying Information to: the law partners, associates, and persons employed in the respective law offices of Provider Defendants' counsel of record; Provider Defendants' respective in-house counsel and their attorneys and staff; and employees of Provider Defendants who have knowledge of the facts alleged in Plaintiffs' Complaint.

In support of this motion, Defendants state as follows.

Defendants seek to proceed with this litigation expeditiously. The Protective Order expressly contemplates "revisit[ing] the issue of disclosing the Identifying Information to the [Provider] Defendants and its use in the balance of this litigation after ruling on Plaintiffs' PI Motion." ECF No. 36 at 2.

On October 13, 2021, this Court denied Plaintiffs' motion for a preliminary injunction, concluding that Plaintiffs had not met any of the factors necessary for injunctive relief. ECF No. 65 at 3, 40-41. On October 15, 2021, the First Circuit denied Plaintiffs' motion for

injunctive relief pending appeal. Order of Court, *Doe v. Mills*, No. 21-1826 (1st Cir. Oct. 15, 2021). On October 19, 2021, the First Circuit affirmed this Court's order denying Plaintiffs' motion for a preliminary injunction. *Doe v. Mills*, -- F. 4th ---, 2021 WL 4860328 (1st Cir. Oct. 19, 2021). On October 29, 2021, the Supreme Court denied Plaintiffs' emergency application for injunctive relief pending their petition for writ of certiorari. *Doe v. Mills*, -- S. Ct. ----, 2021 WL 5027177 (Oct. 29, 2021) (Mem.).

These events support modification of the Protective Order as sought by this motion. Plaintiffs sought to proceed anonymously while their requests for immediate injunctive relief were being adjudicated, so they could make informed choices regarding vaccination before the challenged rule—Immunization Requirements for Healthcare Workers, 10-144 C.M.R. ch. 264, § 2(A)(7) (effective Aug. 12, 2021) [hereinafter, "Emergency Rule"]—would be enforced without threat of termination. But Plaintiffs' attempts to enjoin the Emergency Rule requiring them to be vaccinated against COVID-19 have been unsuccessful. The vaccination requirements in the Emergency Rule have been in effect and subject to enforcement for over a week. Plaintiffs' choices and options are clear.

Other factors support modifying the Protective Order so that Defendants can proceed with this matter expeditiously. Notwithstanding their sworn statements to the contrary, some Plaintiffs may have chosen to get vaccinated in the wake of their unsuccessful legal challenges.¹ Some Plaintiffs may have chosen to leave their employment with the Provider

¹ Compare ECF No. 1 at ¶ 68 (Plaintiffs' "sincerely held religious beliefs compel them to abstain from obtaining or injecting any of [the available COVID-19 vaccines] into their bod[ies], regardless of perceived benefit or rationale"), with Plaintiffs-Appellants' Reply in Support of Emergency Motion for Injunction Pending Appeal, *Doe v. Mills*, No. 21-1826, at 2 (1st Cir. Oct. 15, 2021) (noting given the "choice" between employment termination and vaccination, "some Plaintiffs will undoubtedly choose the latter, because they are only human beings after all").

Defendants to work for employers that are not subject to the Emergency Rule. Provider Defendants need to know Plaintiffs' identities in order to determine these facts.

Further, on November 5, 2021, the Department and Maine CDC filed the final rule, Immunization Requirements for Healthcare Workers, 10-144 C.M.R. ch. 264 (eff. Nov. 10, 2021) [hereinafter, "Final Rule"], with the Secretary of State, which rule becomes effective on November 10, 2021. The Final Rule is not identical to the Emergency Rule challenged by Plaintiffs; one or more of the Plaintiffs may not be subject to the Final Rule. Again, Provider Defendants need to know Plaintiffs' identities in order to determine these facts.

The changed circumstances described above warrant a change in the Protective Order. "[D]efendants have a right to confront their accusers," and fundamental fairness dictates that Plaintiffs' identities be known to all Defendants so that they can defend themselves from the claims that Plaintiffs have made in this suit. *See Doe v. Megless*, 654 F.3d 404, 408 (3d Cir. 2011).

Accordingly, and based on the foregoing, Defendants request that the Protective Order be modified as stated in this motion and for other relief as may be just and proper.

DATED: November 9, 2021

Respectfully submitted,

AARON M. FREY
Attorney General

THOMAS A. KNOWLTON
Deputy Attorney General
Chief, Litigation Division
thomas.a.knowlton@maine.gov

/s/ Kimberly L. Patwardhan
KIMBERLY L. PATWARDHAN,
Assistant Attorney General
kimberly.patwardhan@maine.gov

VALERIE A. WRIGHT
Assistant Attorney General
valerie.a.wright@maine.gov

Office of the Attorney General
6 State House Station
Augusta ME 04333-0006
Tel. (207) 626-8800

Attorneys for State Defendants

/s/ James R. Erwin
JAMES R. ERWIN
jerwin@pierceatwood.com

/s/ Katharine I. Rand
KATHARINE I. RAND
krand@pierceatwood.com

Pierce Atwood LLP
Merrill's Wharf
254 Commercial St.
Portland, ME 04101
(207)791-1100

Attorneys for MaineHealth, MaineGeneral Health,
Genesis Healthcare LLC, and Genesis Healthcare
of Maine LLC

/s/ Ryan P. Dumais
Ryan P. Dumais, Esq.
rdumais@eatonpeabody.com

/s/ Katherine L. Porter
Katherine L. Porter, Esq.
kporter@eatonpeabody.com

EATON PEABODY
P.O. Box 5249
Augusta, Maine 04332-5249
(207) 622-3747

Attorneys for Defendant Northern Light Health
Foundation

CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2021, I electronically filed this document with the Clerk of the Court using the CM/ECF system; that the same will be sent electronically to registered participants as identified in the CM/ECF electronic filing system for this matter.

/s/ Kimberly L. Patwardhan
KIMBERLY L. PATWARDHAN
Assistant Attorney General
Office of the Attorney General
6 State House Station
Augusta ME 04333-0006
Tel. (207) 626-8570
Fax (207) 287-3145
kimberly.patwardhan@maine.gov